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In the
Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., ET AL.,

PETITIONERS,

v.

ALEXI GIANNOULIAS, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a statute that forces an extraction of money from one group of precisely identified individuals and unalterably mandates its transfer to another group of precisely identified individuals violates the Takings Clause of the Constitution's Fifth Amendment, even if the money momentarily passes through the hands of government.

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INTEREST OF *AMICUS CURIAE*[1]

The American Legislative Exchange Council ("ALEC") is the nation's largest bipartisan, individual membership association of state legislators. ALEC has approximately 2,000 members—nearly one-third of all state legislators in the United States. It serves to advance Jeffersonian principles of individual liberty, free and efficient markets, responsible and accountable government, and federalism.

ALEC and its members will be significantly affected by the disposition of this case. ALEC is particularly concerned by the practice of "predatory taxation," whereby state or local governments impose special tax burdens on particular targeted businesses. ALEC has addressed this problem in a variety of resolutions and model legislation opposing the levying of unfair taxes on politically disfavored industries or companies. In its *Statement of Principles on Local Tax Options*, ALEC has emphasized that one of the "[f]undamental principles of equitable tax policy" is that taxes must be "non-distortionary." Accordingly, ALEC's general view is that "[t]axes

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[1] All parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person, or entity (other than *amicus*, its counsel, or its members) made a monetary contribution intended to fund the preparation or submission of this brief. More than ten days prior to the due date, *amicus* provided counsel of record for all parties with notice of their intent to file this brief.

should be designed so that consumers and firms do not change their behavior to reduce their tax burden." Once the Pandora's Box of special interest pleading is opened, the forces let loose in the form of ever greater and more consequential favoritism can be difficult to tame.

Aside from the inequity to industries or businesses subjected to such non-neutral taxation, ALEC has recognized that predatory taxation may result in unconstitutional takings of private property. Accordingly, as a matter of constitutional principle and sound policy, ALEC believes that state and local governments should be required to exercise their taxing powers in a manner that respects private citizens' constitutional rights in property.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant review to correct the Illinois Supreme Court's decision below. The take-and-transfer regime adopted by the Illinois Legislature is a pristine example of the type of forced transfer of property from A to B that this Court has long regarded as unconstitutional. (*See* Section A, below). Nonetheless, the Illinois regime presented itself below clothed in "taxation" garb, and it ultimately proved a doctrinal riddle that the Illinois courts were not capable of solving. (*See* Section B, below). If the law governing A-to-B transfers disguised as "taxes" is not clarified, and the decision below is left uncorrected, the likely result will be a proliferation of unjust exactions of money predicated on nothing more than political expediency, raw power, and legislative logrolling. (*See* Section C, below). For the benefit of ALEC, its 2,000 members, and all state legislators nationwide, this Court should grant review and bring sorely needed clarity to what is now a confused area of law.

REASONS FOR GRANTING THE WRIT

ALEC respectfully submits that *certiorari* should be granted for the following reasons.

A. Take-And-Transfer Schemes Are Unconstitutional.

Consider the following hypothetical scenario. Congress becomes aware that, from sea to sea and in between, America's print newspapers are navigating desperate financial straits. The Hearst

media conglomerate is considering closing down its flagship *San Francisco Chronicle*. *See* Richard Pérez-Peña, *Hearst Threatens to End San Francisco Paper*, N.Y. TIMES, Feb. 24, 2009, at B9. The *Chicago Tribune* goes bankrupt. *See* Phil Rosenthal & Michael Oneal, *Tribune Files for Bankruptcy Protection*, CHICAGO TRIBUNE, Dec. 9, 2008. The *New York Times* looks to sell most or all of its non-media assets plus all or part of its Manhattan headquarters. *See* Richard Pérez-Peña, *Times Co. to Borrow Against Building*, N.Y. TIMES, Dec. 8, 2008, at B2. Print newspapers slide through an era of seemingly irreversible decline that is ascribed on all sides to a drain of readers and advertisers into internet-based "new media." Michael Hirschorn, *End Times*, THE ATLANTIC, Jan./Feb. 2009, at 41.

Congress hits upon a "solution." Congress recognizes that it need only take for newspapers' benefit a small percentage of the net assets of a few people who have profited handsomely from the rise of new media and information technologies—persons like William Gates III (Microsoft), Lawrence Ellison (Oracle), Michael Dell (Dell computers), Paul Allen (Microsoft), Sergey Brin (Google), Larry Page (Google), and Steve Ballmer (Microsoft). Congress recognizes that these seven individuals control, between them, an estimated $214 billion in assets. *See The Forbes 400*, FORBES, Sep. 17, 2008, *available at* www.forbes.com. Congress levies a special three percent "tax" on the assets of these magnificently rich seven individuals (projecting revenues of over $6 billion) and locks away the $6 billion in "tax" proceeds in a fund

specially set apart and dedicated to the financial relief of beleaguered newspapers. The three percent "tax," doled out to a roster of newspapers based on circulation, is projected to wipe out the entire operating deficits of those newspapers, granting the industry a new lease on life.

The newspaper relief regime described above unquestionably would be unconstitutional. Regardless of whether the seven affected individuals were identified by name or described to a certainty in some more roundabout manner, the regime's unconstitutionality could not be seriously doubted. It has been recognized from the dawn of the Republic, predating even the Fourteenth Amendment's ratification, that a legislature sits to make general laws, not to decide whether to take from A and give to B. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798); *Wilkinson v. Leland*, 27 U.S. (2 Pet.), 627, 646 (1829) (Story, J.) ("[w]e know of no case in which a legislative act to transfer the property of A to B without his consent, has been held a constitutional exercise of legislative power").

The hypothetical newspaper relief constitutes an unabashed, unconstitutional A-to-B taking. Such take-and-transfer regimes are and remain unconstitutional notwithstanding the fact that, on its way from A to B, taken money may rest momentarily in the hands of "G," the government.

B. This Court Should Clarify The Contours Of The Doctrine Invalidating Take-and-Transfer Schemes.

The Illinois regime challenged below, like the hypothetical regime described above, is unconstitutional. This unconstitutionality arises from the lack of general applicability of the Illinois take-and-transfer law—as regards both the enumerated class it targets and the enumerated class it benefits—combined with the cast-in-stone nexus between its targets and beneficiaries.

The Illinois regime is no ordinary tax. Under ordinary taxation arrangements, a sovereign raises money for revenue-generating purposes and, once the money comes to rest in the hands of the government, that money becomes subject to allocation via the familiar push and pull of political decisionmaking. Illinois's regime, by contrast, exacts money solely for purposes of pre-directed transfer. The regime thus violates the *Calder v. Bull* principle: it is a naked, statutorily-mandated transfer from the pockets of Group A into the pockets of Group B, where the membership in both groups is effectively closed and the members of both groups can be pre-identified to a certainty by name.

The flagrancy of take-and-transfer constitutional violations of the type described above (and overlooked below) has led to confusion as to the source and dimensions of the constitutional doctrines forbidding them. The reasons for this confusion appear to be two-fold. *First*, take-and-transfer violations, like Illinois's casino-and-racetrack scheme, appear comparatively

infrequently in this Court's decisions. It may well be that this Court's early, unambiguous statements disapproving A-to-B transfers have had salutary effects in dissuading unconstitutional legislative behavior across the ensuing years. *Second*, and more importantly, the rule-of-law outrage committed below implicates foundational constitutional principles embodied in multiple constitutional provisions. The Court should grant review to clarify for the benefit of the lower courts the precise contours of these provisions.

The simple, powerful command that government may not force transfers of property (including money) between private parties is protected by an interconnecting web of constitutional doctrines. The Court has long held, for example, that Congress "must accomplish" its desired results "by rules of general applicability." *United States v. Brown*, 381 U.S. 437, 461 (1965). As Chief Justice Marshall noted almost 200 years ago, it is the "peculiar province of the legislature to prescribe *general rules* for the government of society," but the application of those rules to specific individuals is left to other departments of government. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.) (emphasis added). Fundamental separation-of-powers principles reflect, in part, the Framers' "concern that a legislature should not be able unilaterally to impose a substantial deprivation" on individuals or narrow groups of individuals. *See INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring). These bedrock principles are "expressed" both in the Constitution's "general allocation of power" and in

the Bill of Attainder Clause, *id.*, which prohibits imposing "punishment" on "easily ascertainable members of a group." *United States v. Lovett*, 328 U.S. 303, 315 (1946); U.S. Const. art. 1, § 10, cl. 1; *see also Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 474 (1977) (punitive "confiscation of property" violates rule against bills of attainder).

The Equal Protection and Due Process Clauses likewise play critical roles in precluding government action targeting disfavored groups or individuals. The familiar Due Process prohibitions on retroactive lawmaking, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994), can perhaps best be viewed as restrictions on legislating for the benefit or detriment of a class whose members can always in theory and often in practice be predetermined with certainty in advance. *See* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960) ("another reason underlying the hostility to retroactive legislation is that such a statute may be passed with an exact knowledge of who may benefit from it"). Laws of particularized applicability that target specified groups for unfavorable treatment also trigger searching judicial scrutiny under the Equal Protection Clause. As this Court has recognized, "[w]hen a state distributes benefits unequally"—imposing burdens on some groups, but not others—the resulting distinctions are subject to equal protection scrutiny. *Zobel v. Williams*, 457 U.S. 55, 60 (1982).

Most relevant here, the fundamental purpose of the Takings Clause is to defuse the enduring

problem of legislative targeting. As the Court has long recognized, the Takings Clause "was designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (2001). The Takings Clause therefore prohibits burdening "one or a relatively narrow subset of property owners" with the cost of "projects with much wider social benefits." Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 203 (2002) (discussing classical interpretations of the Takings Clause).

A vital principle that emerges from these related constitutional doctrines is that legislatures must act by general law, not targeted measures aimed at imposing special burdens on a specific group of enumerated individuals. The representative branches may and must raise general revenues for public purposes. What those branches may not do is single out precisely enumerated groups of disfavored citizens, take their property, and then transfer that property into the pockets of an equally precisely enumerated, but much more politically advantaged, group of fellow citizens.

Here, no one disputes that a three percent levy on all casino revenues, with the proceeds deposited into a general revenue account, could be constitutionally enacted by the Illinois Legislature. No one disputes that an equal amount of money

could be appropriated from general funds through ordinary legislative processes to benefit racetracks. What is plainly unconstitutional, however, is the bolted joinder of otherwise innocuous provisions into an holistic take-and-transfer scheme. *Cf. West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994) (taxation and monetary subsidy requirements, each of which would have been independently constitutional if enacted separately, held unconstitutional when combined).

Under this Court's authorities, the question remains whether this scheme violates the Due Process Clause or whether it violates the Takings Clause. *Compare Eastern Enters. v. Apfel*, 524 U.S. 498, 522-37 (1998) (plurality), *with id.* at 547-50 (Kennedy, J. concurring). Although the question is not free of doubt, in ALEC's judgment, a takings analysis provides an appropriate vehicle for recognizing the plain invalidity of Illinois's casino-to-racetrack take-and-transfer. The key to this doctrinal puzzle is recognizing that an impermissible A-to-B taking necessarily occurs where, as here, the individuals from whom money is taken and the individuals to whom money is bestowed are precisely enumerated and inextricably linked by law. This case is much like other cases where this Court has found provisions that would be permissible if enacted apart become unconstitutional when inextricably joined together. *See Healy*, 512 U.S. at 199.

One explanation for the Illinois courts' confusion may lie in the fact that the standard takings remedy differs from other constitutional remedies. Ordinarily, a finding that a taking has occurred

does not constitute an absolute prohibition, but only a conditional prohibition, on government action. The government may go forward and complete its contemplated action, but must pay "just compensation" in order to do so. The standard remedy for takings thus differs from the prohibitory injunctive remedies typically used to enforce other constitutional provisions.

Perhaps for this reason, the court below appeared to suggest that a forced payment of money can never constitute a taking because it purportedly does not involve an exercise of the State's "eminent domain powers." Pet. App. 24a; *see also id.* 26a (an "obligation to pay money" is not a "taking"). In the lower court's judgment, because the State was purporting to exercise its taxing authority, the Illinois take-and-transfer scheme was not subject to heightened scrutiny and any purported "public purpose" would be sufficient to justify the Legislature's action.

By drawing a rigid line that a government-enforced monetary exaction can never constitute a taking, the lower court eviscerated the Takings Clause and misread this Court's precedents. It cannot be seriously disputed that money is a form of property. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 490 (1968) (a "person whose property is diminished by a payment of money wrongfully induced is injured in his property"); *see also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) ("[m]oney is property"). Moreover, this Court's cases have long recognized that "one person's property may not be taken for the benefit

of another private person without a justifying public purpose, *even though compensation be paid.*" *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) (emphasis added); *Cincinnati v. Vester*, 281 U.S. 439, 447 (1930); *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-252 (1905); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159 (1896).

Because paying monetary compensation for the taking of money would make no sense, purported "taxes" that are not embodied in generally applicable law should be subject, not only to the most exacting scrutiny, but also to prohibitory injunctive remedies. *See Eastern Enterprises*, 524 U.S. at 522 (plurality). Indeed, precisely because the Constitution "nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (citations omitted), any "tax" that purports to take money from one enumerated group of individuals for the benefit of another necessarily violates the Constitution.

C. State Legislators Need This Court's Guidance.

As state legislators, ALEC's members have both legal and practical reasons for seeking certainty regarding the scope of the constitutional prohibitions on A-to-B transfers. Legally speaking, the Constitution's Article VI binds state legislators by "Oath or Affirmation" to support the Constitution. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). ALEC members accordingly have an urgent

need to obtain this Court's understanding of all of the relevant constitutional provisions that may apply to the States. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (recognizing incorporation of Takings Clause against the States); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). Practically speaking, uncertainty about the constitutionality of legislation degrades the quality of legislative debate, by making it difficult for legislators to respect the rights of their constituents in cases where the scope of those rights is uncertain.

The legislative history of the law at issue in this case illustrates this difficulty. Legislators in both houses of the Illinois General Assembly spotted and emphasized the constitutional problems with the proposed casino "tax"—all to no avail.

For example, Representative Lang pointed out that the tax affected a taking and reminded his colleagues both of their legal duty not to pass unconstitutional legislation and of the potential practical consequences of costly litigation. *See Illinois House Tr., 94th Gen. Assemb., Reg. Sess., 124th Legis. Day* (Apr. 26, 2006) (L. Lang) ("not only do we have bad public policy where we tax one industry to help another, but we have an unconstitutional taking."); *Illinois House Tr., 94th Gen. Assemb., Reg. Sess., 128th Legis. Day* (May 4, 2006) (L. Lang) ("Ladies and Gentlemen, the Bill's unconstitutional."). Senators Petka, Link, and Cullerton also raised constitutional objections and similarly pointed to the practical consequences of unconstitutional legislation:

> We're just shifting money from one private group to another. ... [T]he two years that we put in the sunset are going to be taken up by a lawsuit, the Attorney General is going to have to defend it, if she doesn't want to, we'll have some private counsel come in and we'll spend state tax dollars, once again, to—trying to defend an unconstitutional law.

Illinois Senate Tr., 94th Gen. Assemb., Reg. Sess., 109th Legis. Day (May 4, 2006) (J. Cullerton). Had this Court's guidance been clearer, these objections more likely would have been recognized for what they are—unanswerable objections to the proposed legislation.

More troubling is the unusually well documented evidence of logrolling in the Illinois Legislature. The record shows that five of the nine riverboat casinos in Illinois were exempted from the tax and that these exemptions may have been granted for the purpose of obtaining the votes of legislators representing the home districts of those casinos. In response to questions about why certain representatives had changed their minds and votes regarding the casino-to-racetrack transfer, the main sponsor in the House of Representatives provided the following explanation:

> I talked to every Member who had boats down in Southern Illinois who told me, try to get an Amendment that takes my boat off. So there are about 10, 15 members that have boats in Southern Illinois that weren't for the Bill that may

> be for the Bill now and that's why you're seeing six or seven or eight changes.

See Illinois House Tr., 94th Gen. Assemb., Reg. Sess., 124th Legis. Day (Apr. 26, 2006) (R. Molaro).

Absent a clearer statement from this Court regarding the unconstitutionality of disguised take-and-transfer regimes, ALEC fears that similar temptations to reward favored micro-constituencies will arise, persist, and prevail in far too many instances in far too many legislatures. If legislators come to expect that courts will turn a blind eye to take-and-transfer schemes, their natural proclivity toward logrolling will be deployed to fine tune the size and composition of legislatively-targeted and legislatively-benefited groups—to the point where our legislators become distracted and our laws become debased.

The lower courts are divided, as the petition points out, as to whether and under what circumstances money may be the subject of an unconstitutional taking. *See* Pet. 10-18. The scholarly commentary agrees that the law could stand a healthy dose of clarification. *See* Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 328, 344 & nn.243-46 (2007) (the question whether and when government imposition of money liability is a taking is "not yet widely established in the case law" and "hardly settled law"); Eduardo Moisés Peñalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2183 (2004) (noting "abiding puzzle[]" and "obvious tension between the rigor with which the Court scrutinizes regulations of property under the Takings Clause and the enormous deference it

displays toward the state's exercise of its power to tax"); John Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1037-38 (2003) (the "law has struggled with the relationship between taxes and takings"); Kades, 97 NW. U. L. REV. at 190 (no one "has offered a coherent theory of the relationship between taxes and takings"). Indeed, this reigning confusion persists notwithstanding this Court's pronouncements that, in an appropriate case, a "tax" might well constitute an unconstitutional taking. *See Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 615 (1899); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934); *Dane v. Jackson*, 236 U.S. 589, 599 (1921); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916).

This case presents a type of egregious take-and-transfer scenario that this Court has occasionally hypothesized, but never squarely confronted: a discriminatory "tax" that takes money from one enumerated group; transfers it to another enumerated group; and inextricably binds the transfer to the taking. The case therefore provides a vehicle for affording legislators across the nation much-needed guidance on the constitutionality of such arrangements. For the benefit of ALEC, its approximately 2,000 members, and all legislators nationwide, the Court should take advantage of this vehicle and grant review.

CONCLUSION

For these reasons, the Court should grant review.

Respectfully submitted,

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